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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HAMMERHEAD ENTERPRISES, INC.,
RONALD PRAMSCHUFER, and
ROBERT JOHNSON

Petitioners,

-against-

STANLEY BREZENOFF, MAYOR and CITY COUNCIL and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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QUESTION PRESENTED

Whether a letter sent by a local welfare administrator to the presidents of certain retail stores, which letter contains an opinion that the

stores would perform a genuine public service by not marketing a board game thought tasteless and offensive by the administrator, constitutes censorship, where the letter contains no threats, warnings, or suggestion of further action, and which letter the trier of fact found could not reasonably be viewed as threatening, and which letter the trier of fact also found had no effect or impact upon the retailers' decisions concerning the game.

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STATEMENT OF THE CASE

Petitioners seek to have this Court review by writ of certiorari an order of the United States Court of Appeals for the Second Circuit, entered April 28, 1983, which affirmed the order of the District Court, Southern District of New York, which, after a bench trial, found for defendants, on the merits, and dismissed the complaint. The opinions are reported at 707 F.2d 33 and 551 F. Supp. 1360.

Petitioners had brought suit under 42 U.S.C. 1983, and pendent state tort law claims, alleging that a letter, written by Stanley Brezenoff, Commissioner of Social Services of the City of New York, violated their First Amendment rights.

Petitioners are the manufacturer and creators of a board game called "Public Assistance - Why Bother Working for a Living." The game, described in some detail in the opinions of the Second Circuit

and District Court (A7-8, A51),* generated a great deal of controversy and widespread media attention, at the instigation of petitioners, who testified that "controversy sells games" ((JA363).

Brezenoff, the Commissioner of Social Services, administers welfare programs in the City of New York, and is a frequent spokesman for the poor on public issues regarding welfare. The Commissioner of Social Services exercises no licensing, inspection, taxing or regulatory authority over, nor has any relationship with retail stores (JA49-50, 430).

After seeing the game, Brezenoff was disturbed by its unfair and inaccurate portrayal of public assistance recipients, and believed that these inaccuracies required a response. Accordingly, he drafted a letter (reproduced in full in the Circuit Court's opinion (A54), sent to the presidents of

*Numbers in parenthesis, preceded by "A" refer to pages of petitioners' Appendix to their Petition. Numbers preceded by "JA" refer to pages of the Joint Appendix in the Court of Appeals.

thirteen retail stores in New York City, pointing out the game's inaccuracies, unfairness, and poor taste, and requesting that they not market it. Brezenoff testified at trial that he hoped to inform and thereby aid the stores in making a proper decision, and that he wished to persuade them that it was inappropriate to sell the game. He further testified that the letter involved no restraint, but simply gave his point of view.

The District Judge, the trier of fact, found credible Brezenoff's testimony that his sole purpose was to respond, not censor. The Court further found that the credible evidence showed nothing surreptitious about the letter, nor was it threatening. Rather, found the trial court, the letter was an appeal to conscience and decency.

Petitioners produced no credible evidence that any of the stores that received the letter regarded it as threatening, and no evidence that the letter caused them not to sell the game. The letter was found to have had no effect.

Petitioners did not call as witnesses any of the recipients of the letter, other than an employee of one of the stores, whose testimony was found to lack credibility (A21-23,56)*. Petitioners attempted to introduce testimony from persons who did not receive the letter, that if they had, they would have regarded it as threatening. The District Court rejected this proferred testimony as speculative and incompetent (JA 245, 275).

No credible evidence was produced to sustain petitioners' claim of a conspiracy between Brezenoff and Edward Weaver, director of the American Public Welfare Association (A15). The Second Circuit, on review, found the claim "as spurious as it appears" (A60).

*Among the numerous misstatements of fact in the petition is the statement on p. 12, ftnte 3, devoid of any basis in the record, implying that the letter had intimidated Brentanos from carrying the game. The record actually reveals that petitioners' own witness admitted that neither Brezenoff's views, nor the game's poor taste deterred the store from carrying the game, in response to customer requests, some months before Brentanos filed for bankruptcy (JA 386,391).

The trial court found that none of petitioners' claims were supported by a fair preponderance of credible evidence, or had legal merit, and dismissed the complaint, stating its findings of fact and legal conclusions in a detailed opinion (A1 - A46).

The Second Circuit affirmed, finding that the case did not involve censorship, as claimed by petitioners, but rather, was a matter of petitioners seeking to improperly use the First Amendment to shield their own critique from criticism (A50).

REASONS FOR DENYING A WRIT OF CERTIORARI

THE LETTER DOES NOT VIOLATE OR INFRINGE PETITIONERS' FIRST AMENDMENT RIGHTS. PETITIONERS FAILED TO DEMONSTRATE THAT THE LETTER HAD ANY IMPACT OR CHILLING EFFECT ON ITS RECIPIENTS, WAS INTENDED TO HAVE SUCH EFFECT, OR THAT ANY REASONABLE PERSON COULD SO REGARD IT.

Brezenoff's letter does not constitute censorship. It is a simple and direct statement of fact and opinion, precatory in tone and substance. There is no mention of any plan to take formal or informal action to prevent sale of the game. There is no threat of any type of punishment nor suggestion of any reward in connection with the decision of a store as to whether to carry the game. There is no claim of any authority to regulate the game in any fashion. There is no statement that the game is illegal or impermissable, only statements that in the writer's opinion it is in bad taste. There is not even a suggestion of a sanction, for none exists. Brezenoff was the Commissioner of a Social Service Department, responsible for the

issuance of food stamps and welfare checks, and had no official or business contact with department or toy stores. The recipients of the letter, the chief executives of major stores, would clearly know that they have no contact with, or regulation by, the Department of Social Services.

No recipient could reasonably regard the letter as threatening, and none, in fact, did. Petitioners failed to demonstrate by credible evidence that the letter had any impact on the retailers' decisions regarding the game, that the letter resulted in petitioners' loss of even a single penny, or that the letter was regarded as coercive or threatening by even a single recipient.

Petitioners' speculative discussion of the "possibility" of reading a threat into the letter presents no true issue, for the matter was specifically resolved, against petitioners, at trial, where they produced no credible evidence in support of the "possibility".

The presentation, in the petition, of other speculative scenarios does not warrant a grant of certiorari. To decide the issues raised by those hypotheticals on the record of this case would be tantamount to deciding a matter, not in litigation, on another set of facts. The case at bar has been decided on its facts and those facts showed petitioners' case to be without merit. The case presents no issue warranting review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

September 15,1983

Respectfully submitted,

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